No. 18-2250

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Brett Baber, *et al.*

Plaintiffs-Appellants,

v.

Matthew Dunlap, Secretary of the State of Maine, *et al.*,

Defendants-Appellees,

Jared Golden,

Intervenor-Defendant-Appellee,

and Tiffany Bond, *et al.*,

Intervenors-Defendants-Appellees.

PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

On Appeal from the United States District Court for the District of Maine
Case No. 1:18-cv-00465-LEW

Pursuant to Federal Rule of Appellate Procedure 8(a)(2), Plaintiffs-Appellants move for an emergency injunction pending appeal preventing the State of Maine from certifying a winner of the November 6, 2018 election for Maine's Second Congressional District pursuant to Maine's Ranked-Choice Voting Act, 21-A M.R.S. § 723-A ("RCV Act").

This was the first-ever general election for federal office in our nation's history to be decided by "ranked-choice" voting ("RCV"), or "instant runoff" voting. RCV unconstitutionally forces voters to cast several votes in hypothetical future runoff elections when they cast their first and only ballot, and discards certain cast votes in order to manufacture a faux majority for the runoff winner. While a handful of jurisdictions use RCV in local races, no federal appellate court has ever addressed RCV's use in federal elections. The Maine Supreme Court has barred the Act, enacted in 2016, from use in state elections because it violates the state constitution. *Op. of the Justices*, 162 A.3d 188 (Me. 2017).

The 2018 election results prove Maine's RCV Act violated all voters' Due Process and Equal Protection rights, the Voting Rights Act, and Article I of the U.S. Constitution. In denying Plaintiffs' requests for a preliminary and permanent injunction, the district court sidestepped the explicit questions presented, often casting the questions at a more superficial level of analysis. In the absence of injunctive relief maintaining the status quo, the State may certify the election

results before this Court can consider Plaintiffs' claims, thereby permanently depriving them of the ability to vindicate their constitutional rights to a constitutionally compliant election and election results. The impending certification makes seeking relief from the district court pending appeal impracticable. Fed. R. App. P. 8(a)(2)(A)(i). For the same reason, and in light of the impending holidays, Plaintiffs also respectfully request a ruling on this Motion by December 21 and urge the Court to expedite briefing to the fullest extent appropriate. *See, e.g.*, *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 7 (1st Cir. 2012) (discussing this Court's issuance of an injunction pending appeal and expedited briefing in light of an imminent deadline).

QUESTIONS PRESENTED

(1) Do voters have a substantive due process right under the U.S. Constitution's First and Fourteenth Amendments to know which candidates are standing for election at the time they cast their ballots? Relatedly, does a law that denies voters such knowledge violate the Voting Rights Act by depriving them of an effective vote?

(2) Does a state election law under which certain voters, but not others, have the ability to shift their vote from candidate to candidate, thereby affording them a greater degree and different kind of electoral power, violate the Fourteenth Amendment's Equal Protection Clause?

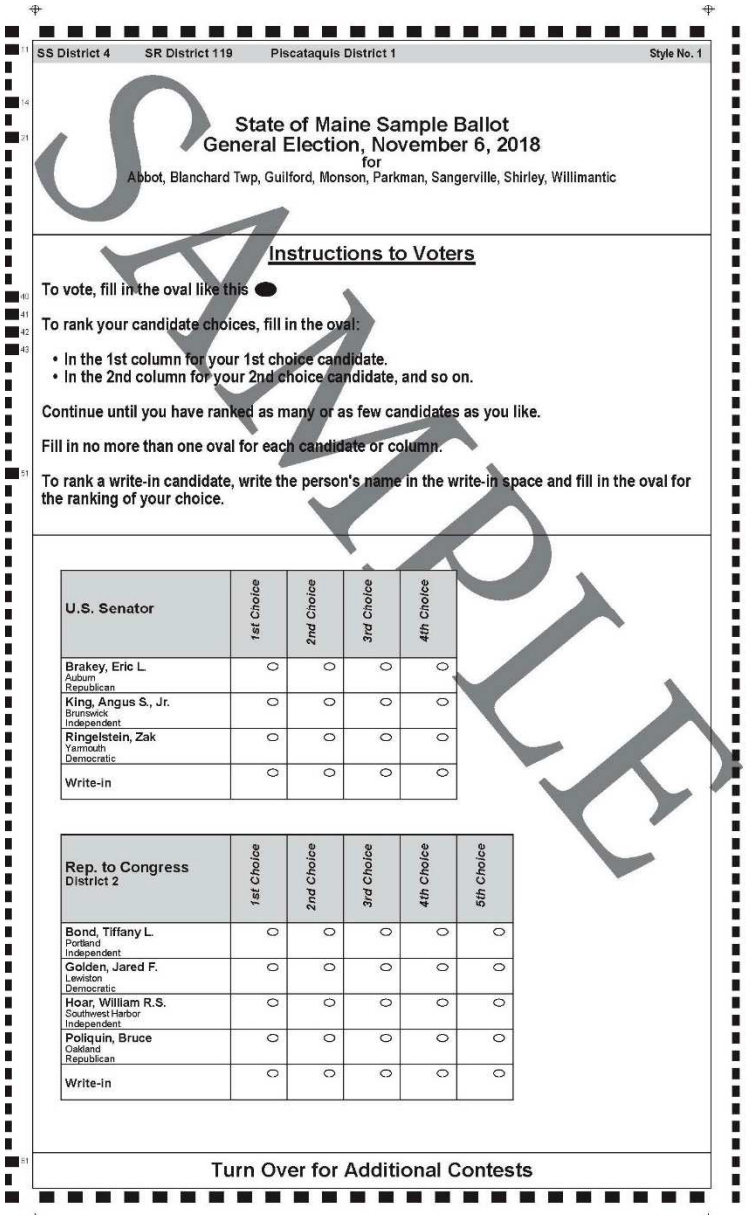
(3) Does an election law that dictates the outcome of a federal election by redistributing votes from one plurality winner to another, or by manipulating the electorate size to create an artificial majority winner, exceed a state's authority under Article I of the Constitution?

The district court sidestepped these issues by addressing fundamentally different questions, thereby committing reversible error. Plaintiffs respectfully submit that this case presents the type of serious legal questions that, combined with the requisite balancing of harms and interests, merit an immediate injunction pending appeal.

BACKGROUND

I. Maine's RCV Act and the November 6 Election

Maine's RCV Act purports to determine a winner by "majority" vote by collapsing initial and runoff elections into a single ballot. For an applicable office, voters vote for a first-choice candidate, a second choice, and so on:



SS District 4 SR District 119 Piscataquis District 1 Style No. 1

State of Maine Sample Ballot
General Election, November 6, 2018
for
Abbot, Blanchard Twp, Guilford, Monson, Parkman, Sangerville, Shirley, Willimantic

SAMPLE

Instructions to Voters

To vote, fill in the oval like this ●

To rank your candidate choices, fill in the oval:

- In the 1st column for your 1st choice candidate.
- In the 2nd column for your 2nd choice candidate, and so on.

Continue until you have ranked as many or as few candidates as you like.

Fill in no more than one oval for each candidate or column.

To rank a write-in candidate, write the person's name in the write-in space and fill in the oval for the ranking of your choice.

U.S. Senator	1st Choice	2nd Choice	3rd Choice	4th Choice
Brakey, Eric L. Auburn Republican	○	○	○	○
King, Angus S., Jr. Brunswick Independent	○	○	○	○
Ringelstein, Zak Yarmouth Democratic	○	○	○	○
Write-in	○	○	○	○

Rep. to Congress District 2	1st Choice	2nd Choice	3rd Choice	4th Choice	5th Choice
Bond, Tiffany L. Portland Independent	○	○	○	○	○
Golden, Jared F. Lewiston Democratic	○	○	○	○	○
Hoar, William R.S. Southwest Harbor Independent	○	○	○	○	○
Poliquin, Bruce Oakland Republican	○	○	○	○	○
Write-in	○	○	○	○	○

Turn Over for Additional Contests

A candidate who receives an outright majority of first-choice votes in the first round wins. If none receives a majority, the candidate with the fewest first-choice votes is eliminated, and voters whose first-choice candidates are eliminated have their second-choice votes redistributed to "continuing" candidates. If a voter has not ranked a candidate who continues to the next round, the voter's ballot is "exhausted" and disregarded and the voter is discarded from the electorate. This

process repeats, eliminating candidates and reducing the electorate size until one candidate wins a "majority" of the undiscarded votes. *See* 21-A M.R.S. § 723-A; Me. Citizen's Guide to the Referendum Election, Nov. 8, 2016 at 50.[1]

Incumbent Representative Bruce Poliquin won a plurality of the votes on November 6 – besting his nearest competitor by more than 2,000 votes – in a four-way race against Jared Golden, Tiffany Bond, and William Hoar. Because Poliquin did not receive an absolute majority of first-choice votes, the Secretary of State ("Secretary") conducted a runoff vote tabulation under the RCV Act. In the runoff, the Secretary redistributed the votes of 23,427 voters who voted for Bond or Hoar as their first-choice candidates. Of those votes, 15,174 were transferred to either Poliquin or Golden based on the voters' second- or third-choice votes. In an outcome-determinative act, the Secretary then discarded the remaining 8,253 votes cast by voters who selected Bond or Hoar as their first-choice candidates, but whose ballots were "exhausted" in the runoff tabulation. *See* Sec'y Opp'n Ex. F-2 (Doc. 44-3).[2] After manipulating the vote count and culling the electorate in this manner, the Secretary declared Golden had won by a bare majority, even though Golden, like Poliquin, had earned only a plurality of the total votes cast in the election, as illustrated below:

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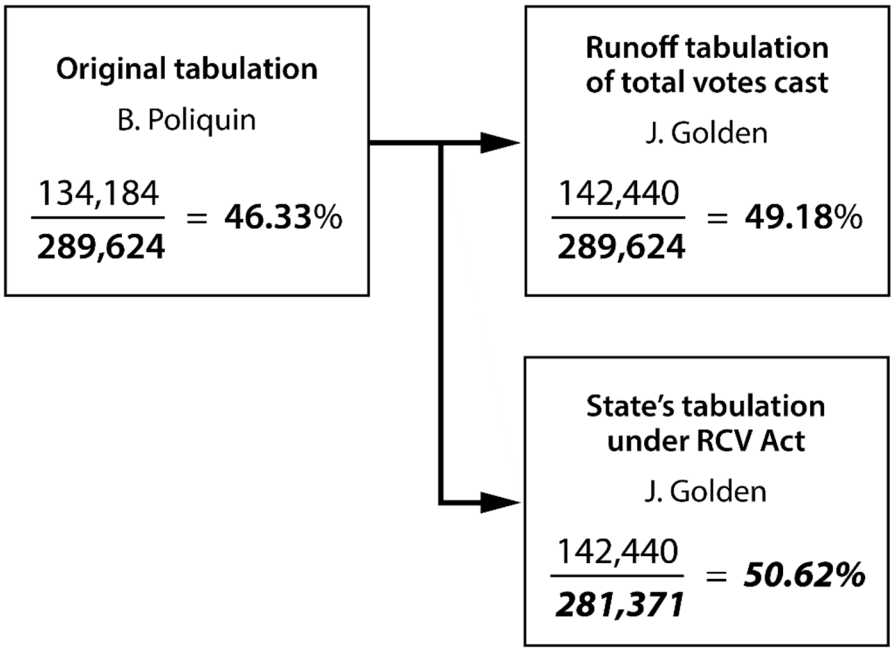
1 www.maine.gov/sos/cec/elec/upcoming/citizensguide2016.pdf

2 All citations are to documents in the district court proceedings.



See id.

II. Procedural History

On November 13, 2018, Plaintiffs filed their Complaint challenging Maine's RCV Act as violating Article I and the First and Fourteenth Amendments of the U.S. Constitution and the Voting Rights Act. On November 15, the district court denied Plaintiffs' request for a temporary restraining order, observing that an equitable remedy "may be informed by the final tabulation of votes." The district court subsequently held a hearing on December 5, at which the parties agreed to consolidate consideration of Plaintiffs' request for injunctive relief with a final ruling on the merits. On December 13, the district court issued an order and opinion granting summary judgment for Defendants. Ex. A. This appeal immediately followed.

ARGUMENT

The Court considers four factors in granting an injunction pending appeal: (1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will be irreparably injured absent an injunction; (3) whether an injunction will substantially injure the other interested parties; and (4) whether an injunction is in the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Where, as here, the case is one of "initial impression wherein respectable minds might differ," Plaintiffs need only show there are "serious legal questions presented" if denial of an injunction will irreparably alter the status quo. *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979); *see also Acevedo-Garcia v. Vera-Monroig*, 296 F.3d 13, 16 (1st Cir. 2002) (equating test for stays and injunctions pending appeal). Plaintiffs satisfy these factors.

I. Plaintiffs Are Likely to Succeed on the Merits.

A. Maine's RCV Act Violates the First and Fourteenth Amendments and Voting Rights Act.

Maine's RCV Act triggers instant runoff elections when no candidate receives a majority vote in the initial election. This forces voters to vote in hypothetical future runoff elections when they cast their initial ballot without actually knowing the exact candidate matchup in the runoff – information critical to voter choice. The State conceded this at oral argument but contended – remarkably – that "[t]here is no constitutional right to know who's going to be in

the final round." Dec. 5, 2018 Hrg. Tr. at 87:21-22 (Ex. B). Plaintiffs expressly cited that concession as decisive to their Due Process claim:

> The state has argued… that there is no constitutional right to know who the candidates are on the ballot when you vote… We believe there is a constitutional right to know that, that it is critical to the effective right of the franchise, and we ask that a judge declare that act unconstitutional.

Id. at 102:22-103:4; *see also* Plaintiffs' Reply (Doc. 52) at 2-5, Mot. for P.I. (Doc. 3) at 8-13. The district court sidestepped this issue altogether and instead addressed other issues: e.g., "that RCV is susceptible to producing arbitrary or irrational election results," and that "a significant segment of the voting public cannot comprehend RCV sufficiently to cast a meaningful vote." Op. at 25. The court's failure to even take up the critical issue in Plaintiffs' substantive due process and Voting Rights Act claims is reversible error.

1. *The RCV Act Imposes a Severe Burden and Denies Voters an Effective Vote*.

Laws that impose "severe burdens" on voting must be "narrowly tailored to serve a compelling state interest." *Clingman v. Beaver*, 544 U.S. 581, 586 (2005). Even laws that impose "lesser burdens" on voting still must advance "important regulatory interests" and may not impose unreasonable, discriminatory restrictions. *Id.* at 587. In either case:

> A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments… against the precise interests put forward by the State as justifications for the burden

> imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.

Burdick v. Takushi, 504 U.S. 428, 434 (1992).

In determining whether a law imposes a "severe" burden, "[t]he judicial inquiry should be focused on the extent of [] obstacles, not merely technical, to casting an *effective* and *informed* vote," and should assess whether the law "minimiz[es]… voter confusion" and "maximiz[es]… [voters'] *appraisal of candidates*." *Walgren v. Howes*, 482 F.2d 95, 100 (1st Cir. 1973) (emphasis added). Laws that limit the choice of candidates and information presented on the ballot impose a "severe" burden. *See*, *e.g.*, *Norman v. Reed*, 502 U.S. 279, 282, 288-89 (1992); *Libertarian Party v. Scholz*, 872 F.3d 518, 524 (7th Cir. 2017); *Nader v. Brewer*, 531 F.3d 1028, 1038 (9th Cir. 2008); *Libertarian Party v. Blackwell*, 462 F.3d 579, 581-82 (6th Cir. 2006).

The First and Fourteenth Amendments guarantee "the right of all qualified voters to cast their votes *effectively*." *Ayers-Schaffner v. DiStefano*, 37 F.3d 726, 729 (1st Cir. 1994) (emphasis added). Voters cannot vote "effectively" when they cannot see or understand what is on the ballot. *See*, *e.g.*, *Puerto Rican Org. for Political Action v. Kusper*, 490 F.2d 575, 580 (7th Cir. 1973); *Hamer v. Ely*, 410 F.2d 152, 156 (5th Cir. 1969).

Maine's RCV Act severely burdens and deprives voters of an effective vote by forcing them to vote contemporaneously in both the initial and runoff elections

based on the entire initial field of candidates, without knowing whether a runoff will occur or the actual runoff candidate matchups. This knowledge is critical to exercise of the franchise.

First, as this election shows, the RCV Act caused the votes of more than 8,000 who voted for Bond and/or Hoar across their ballots to be "exhausted," and the Secretary discarded those voters from the electorate in the runoff. *See* Sec'y Opp'n Ex. F-2 (Doc. 44-3); Supp. to Gimpel Aff. Ex. A (Doc. 51). The district court speculated that these discarded votes were all "protest votes" of those who "did not want to vote for either Mr. Golden or Mr. Poliquin regardless of whether they believed they would be the run-off candidates." Op. at 26. However, more than 600 voters who ranked Bond or Hoar as their first- and second-choice candidates, and whose ballots were therefore discarded in the runoff tabulation, also voted for Poliquin or Golden in the fourth or fifth columns. *See* Supp. to Gimpel Aff. Ex. A (Doc. 51). That many voters marked runoff votes for Poliquin or Golden is strong, direct evidence that they desired to vote for Poliquin or Golden in a runoff scenario, but simply guessed incorrectly about which candidates would remain in which runoff round(s). And all of the more than 8,000 discarded voters *tried* to vote in the runoff election. It blinks reality to speculate, as the State and district court did, that over 8,000 voters intended their votes to be discarded, i.e., disenfranchised, in the runoff.

All this goes to Plaintiffs' more fundamental point: The RCV Act gives voters no means to know with certainty when they mark their ballots whether their votes in the runoff will be ignored and discarded. *See* Gimpel Aff. Ex. A (Doc. 51); Sorens Aff. (Doc. 4). And this patent infirmity in instant-runoff voting was exacerbated here by ballot instructions that did not even inform voters whether and under what circumstances their subsequent-choice votes would be disregarded, merely instructing voters to "rank[] as many or as few candidates as you like." *See supra* at 4. Without being told the significance or consequence of marking or not marking second-, third-, or fourth-choice runoff candidates, voters simply cannot make a meaningful, informed decision about whether and how they should vote in runoff rounds.

The district court acknowledged that voters must guess at "likely" runoff scenarios, Order on Pls' Mot. for TRO at 9 n.4 (Doc. 26), but ultimately dismissed this serious problem by proffering that "[t]he Constitution does not require an easy ballot." Op. at 27. This severely misidentifies the actual problem: The RCV Act forces voters to "guess" at who is on the ballot, which violates substantive due process. *See Jones v. Bates*, 127 F.3d 839, 859 (9th Cir. 1997) (invalidating a ballot that forced voters "to guess as to [its] very meaning and effect"), *rev'd on other grounds*, 131 F.3d 843, 846 (9th Cir. 1997) (en banc); *see also Burton v. Ga.*, 953 F.2d 1266, 1269 (11th Cir. 1992) ("substantive due process requires… that the

voter not be deceived about what [is on the ballot]"); *Sprague v. Cortes*, 223 F. Supp. 3d 248, 288 (M.D. Pa. 2016) (quoting *Burton*).

Second, when presented with alternative and narrowed candidate matchups, many voters have different preferences than when they voted initially. Voter data show that in a four-way race such as the one here, 15% of voters have such intransitive candidate preferences. Benjamin Radcliff, The Structure of Voter Preferences, 55 Journal of Politics No. 3, 715-716 (1993); Gimpel Aff. Ex. A (Doc. 51); Sorens Aff. (Doc. 4). The U.S. Court of Appeals for the Ninth Circuit, in ruling on San Francisco's RCV law, critically observed that instant runoff voting does not "allow[] voters to *reconsider* their choices after seeing which candidates have a chance of winning. In other words, voters must submit their preferences… even though they might have chosen differently with more specific information about other voters' selections, they are not provided an opportunity to revise their choices." *Dudum v. Arntz*, 640 F.3d 1098, 1105 (9th Cir. 2011) (emphasis in the original).[3] Although Plaintiffs repeatedly argued this issue, the district court did not address this severe burden on voting rights. *Walgren*, 482 F.2d at 100.

[3] The Ninth Circuit did not rule on this infirmity because the plaintiff did not raise the issue. *See id.* at 1106-07.

2. The RCV Act Fails the Strict Scrutiny or "Important Regulatory Interests" Standards.

Because the district court failed to acknowledge and address the RCV Act's severe burdens, it erroneously concluded strict scrutiny does not apply. Op. at 29. The district court also credited the Act with furthering two or three state interests.[4] Assuming these are even legitimate interests, they are insufficient to outweigh the Act's severe burdens.

First, the district court concluded the Act "was motivated by a desire to enable third-party and non-party candidates to participate in the political process, and to enable their supporters to express support, without producing the spoiler effect." *Id.* No authority was cited recognizing this as a legitimate state interest, much less a compelling one.[5] To the contrary, the Supreme Court has recognized "[b]allots serve primarily to elect candidates, not as forums for political expression." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997). Presumably, many who vote for "spoiler" candidates intend the spoiler effect. Because RCV merely nullifies those votes' effects, the claimed state interest

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[4] The district court did not identify all of these interests relative to the *Burdick* balancing framework. Plaintiffs have used their best efforts to discern and fairly present these interests from the court's opinion.

[5] The Minnesota Supreme Court specifically did not rule on this purported interest in considering Minneapolis' RCV law. *See Minn. Voters Alliance v. City of Minneapolis*, 766 N.W. 2d 683, 697 n.8 (Minn. 2009).

actually harms voter choice, negates voter expression, and achieves its objective by discarding thousands from the electorate.

Framed less charitably, this justification amounts to a state interest in favoring major-party candidates, which assuredly is *not* legitimate. *See*, *e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983); *Libertarian Party*, 462 F.3d at 586-87. Therefore, the RCV Act fails even the minimal "important regulatory interests" review standard. Regardless, even if protecting major candidates against "spoilers" were recognized as a legitimate state interest for the first time here, the RCV Act is not narrowly tailored because this interest can be served by holding actual runoff elections on ballots presenting actual alternatives.

Second, the district court credited the RCV Act with "assur[ing] that the winner of an election is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections." Op. at 24 (quoting *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979). As discussed above (at 5-6), the RCV Act did not actually produce a "majority" winner here. The Secretary declared Golden the winner with only 49.18% of the total votes cast. Only by discarding more than 8,000 votes was Golden determined to have won a "majority."

The other state interest the district court identified – "giv[ing] voice to [voters'] varied perspectives," Op. at 24 – also is nonexistent here. Thwarting

"spoilers" and discarding more than 8,000 ballots of their supporters does not "giv[e] voice" to them. Relative to a conventional plurality-wins election, in which they have a greater chance at affecting the election outcome, the RCV Act actually gives these voters less voice. Relative to actual runoffs, the RCV Act also gives them no greater voice. Thus, the district court's articulated state interest is illusory.

"Majority support" also is not a "compelling" state interest, given that such a voting requirement historically has been rooted in invidious discrimination, and the vast majority of American jurisdictions reject it. *See* Laughlin McDonald, *The Majority Vote Requirement: Its Use and Abuse in the South*, 17 THE URBAN LAWYER 429 (1985); Reid Wilson, *Runoff elections a relic of the Democratic South*, WASH. POST, Jun. 4, 2014.[6] Regardless, the more narrowly tailored way to achieve this goal is, again, through actual runoffs, which eliminate the constitutional infirmities.

Moreover, "an interest in the 'preservation of the state's limited resources'" generally cannot justify abridging fundamental rights or unconstitutional discrimination, contrary to the district court's erroneous and opposite suggestion. *Plyler v. Doe*, 457 U.S. 202, 227 (1982); *see also Heller v. Dist. of Columbia*, 801

[6] https://www.washingtonpost.com/blogs/govbeat/wp/2014/06/04/runoff-elections-a-relic-of-the-democratic-south/?utm_term=.2e7c8fdee02b.

F.3d 264, 287 (D.C. Cir. 2015). Indeed, in the *Socialist Workers* case the district court cited for Maine's interest in reducing "the expense and burden of runoff elections," the Supreme Court held that states must "adopt the least drastic means to achieve [this] end[]." 440 U.S. at 185. Equally important here, the Court held that the Illinois law at issue – which purportedly furthered this state interest – violated the Equal Protection Clause by disproportionately harming non-party candidates. *Id.* at 176-77, 180, 186.

Notably, the State also did not assert any of these purported interests in prior litigation involving the RCV Act. *See Me. Republican Party v. Dunlap*, 324 F. Supp. 3d 202, 212 (D. Me. 2018). These *post hoc* justifications cannot support severe or discriminatory burdens on the franchise. *See Libertarian Party v. Gardner,* 843 F.3d 20, 31 (1st Cir. 2016).

3. The RCV Act Violates the Voting Rights Act.

As discussed above, Maine's RCV Act deprives voters of their right to an effective vote, which is protected by the U.S. Constitution and the federal Voting Rights Act ("VRA"). *See* 52 U.S.C. §§ 10307(a), 10310(c)(1). The district court implicitly concluded that because Plaintiffs' claims do not involve racial discrimination, the VRA does not "ha[ve] any application to this case." Op. at 9. While the VRA indisputably was enacted to address racial discrimination, so was 42 U.S.C. § 1983. *See Ngiraingas v. Sanchez*, 495 U.S. 182, 187 (1990). Like the

broadly applied section 1983, the VRA provisions relied on here are not limited to racial discrimination and plainly protect "effective" voting for all Americans. The district court's holding to the contrary is reversible error.

B. Maine's RCV Act Violates the Equal Protection Clause.

Plaintiffs alleged the RCV Act violates Equal Protection by treating voters' ballots differently in the runoff tabulation and affording some more electoral choices and power than others. The basic "concept of equal protection… requir[es] the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Equal Protection is violated whenever voters are treated unequally absent a "compelling state interest." *See*, *e.g.*, *Hill v. Stone*, 421 U.S. 289, 295 (1975); *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972); *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969). Equal Protection applies to the disparate post-election treatment of ballots and votes as fully as it applies to ballot access. *See Bush v. Gore*, 531 U.S. 98, 103 (2000).

Under Maine's RCV Act, while all voters begin at the same starting line and cast one initial ballot, their ballots and votes are treated quite unequally thereafter. Specifically, in each runoff round, voters who voted for losing candidates can shift their votes to different runoff candidates, and their ballots are counted for multiple

candidates. Other voters are locked into voting only for their first-choice candidate, with no ability to shift electoral support to other candidates in runoff rounds. The discriminatory ability to shift one's vote, on one ballot, from candidate to candidate affords certain voters a greater degree and different kind of electoral power than others. This unequal treatment of voters, ballots, and electoral power violates the core Equal Protection requirement of "uniform treatment" of all voters in all aspects of election administration. *Reynolds,* 377 U.S. at 565; *Bush*, 531 U.S. at 104-09.

There is no compelling state interest to justify this differential treatment. The inability of voters whose first choice is locked in "to controvert the presumption" that they still wish to vote for that candidate in subsequent runoff rounds "imposes an invidious discrimination in violation of the Fourteenth Amendment." *Carrington v. Rash*, 380 U.S. 89, 96 (1965). Furthermore, if voters are "express[ing]" their candidate support through RCV, Op. at 4, 18, the RCV Act also violates Equal Protection by treating voters' expressive activity differently absent "an appropriate governmental interest suitably furthered by the differential treatment." *Police Dep't v. Mosley*, 408 U.S. 92, 94-95 (1972). Again, the power to shift votes among candidates could be afforded all voters equally in an actual runoff.

The district court avoided addressing this serious legal challenge by noting superficially that Plaintiffs' ballots "remained and were counted" in the runoff tabulation, and therefore they did not receive fewer votes than those who were given do-overs when their first-choice candidates were eliminated and their votes were shifted to their subsequent choices. Op. at 22. The district court also concluded the Equal Protection Clause applies only to discrimination against a "protected class." *Id.* at 18. This is obvious reversible error. The Equal Protection Clause protects all citizens' voting rights. Even the parentheticals accompanying its cited authorities reveal the district court's erroneous view of the law, *see id.*, and multitudinous election law cases have found an Equal Protection violation absent any "protected class." *See*, *e.g.*, *Bush*, 531 U.S. at 103; *Bd. of Estimate of City of New York v. Morris*, 489 U.S. 688, 690 (1989); *Hill*, 421 U.S. at 295; *Dunn*, 405 U.S. at 337; *Cipriano*, 395 U.S. at 704; *Kramer*, 395 U.S. at 627; *Reynolds*, 377 U.S. at 568; *Baker v. Carr*, 369 U.S. 186, 237 (1962).

C. Maine's RCV Act Exceeds the State's Article I Authority.

Plaintiffs alleged Maine's RCV Act violates Article I by requiring majority-vote elections for U.S. House of Representatives members, manipulating vote counts and electoral outcomes, discarding ballots from the electorate, and favoring certain candidates over others. *See*, *e.g.*, Plaintiffs' Reply Br. (Doc. 52) at 1-2; Dec. 5, 2018 Hrg. Tr. at 77-78. The district court focused exclusively on the

majority-vote requirement and ignored Plaintiffs' broader argument that the RCV Act exceeds Maine's authority to regulate the "Time, Places and Manner" of congressional elections. This was reversible error in both respects.

The district court concluded states have broad authority to regulate federal elections because "the powers delegated by the Constitution to the federal government were few and defined." Op. at 11. But "[t]he federal offices at stake arise from the Constitution itself. Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power had to be delegated to, rather than reserved by, the States." *Cook v. Gralike*, 531 U.S. 510, 522 (2001). To that end, the Constitution granted the states only limited authority to regulate the "Times, Places and Manner" of holding congressional elections. U.S. Const., art. I, § 4.

Of relevance here, "manner" "encompasses matters like notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns," and generally "the numerous requirements as to procedure and safeguards which experience shows *are necessary* in order to enforce the fundamental right involved[,] ensuring that elections are fair and honest and that some sort of order, rather than chaos, is to accompany the democratic process." *Cook*, 531 U.S. at 523-24 (emphasis added). Article I does

not permit state laws that "dictate electoral outcomes" or "favor or disfavor a class of candidates." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34 (1995).

The RCV Act far exceeds Maine's limited Article I authority to prescribe ministerial laws regulating the "manner" of congressional elections. As the district court recognized, the Act purports to further major state policies wholly unrelated to what is "necessary" for "ensuring that elections are fair and honest" and "order[ly]," or for "prevention of fraud and corrupt practices." *Cook*, 531 U.S. at 523-24. The Act also goes far beyond merely "counting of votes" to treating ballots differently based on how voters' first-choice candidates performed and discarding certain ballots in order to achieve an artificial "majority" winner while, in reality, merely shifting the election results to prefer one plurality winner over another. As the district court also concluded, the Act is intended to stymie "spoiler" candidates and discard their voters from the election or redistribute their votes to mainstream candidates, while pretending voters have enhanced freedom to vote for minority candidates. In short, the RCV Act is precisely the type of law that "dictate[s] electoral outcomes" and "favor[s] or disfavor[s] a class of candidates" that states have no authority to enact under Article I. *U.S. Term Limits*, 514 U.S. at 833-34. The district court's failure to even address this serious constitutional infirmity in the Act is reversible error.

Separately, the district court erred in concluding Maine's limited Article I authority encompasses the RCV Act's majority-vote requirement. As the U.S. Court of Appeals for the Second Circuit has noted, Article I, section 2's provision that House of Representatives members are to be "chosen… by the People of the several States" "has always been construed to mean that the candidate receiving the highest number of votes at the general election is elected, although his vote be only a plurality of all votes cast." *Phillips v. Rockefeller*, 435 F.2d 976, 980 (2d Cir. 1970). Article I, section 2's requirement that representatives be "chosen . . . by the People" limits Maine's ability to engineer a "majority" as it has done here.

II. An Injunction Pending Appeal Is Needed to Prevent Irreparable Injury

Absent an injunction, the State will imminently certify the election results under the RCV Act's dictated outcome, and the winner will take office on Jan. 3, 2019. This impending deprivation of Plaintiffs' constitutional rights "unquestionably constitutes irreparable injury." *Sindicato Puertorriqueno*, 699 F.3d at 10-11. More specifically, the state's certification of this election, in which votes were treated unequally and more than 8,000 votes were discarded entirely, threatens "actual and imminent" injury remediable only by injunctive relief. *Hoblock v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 97 (2d Cir. 2005). "Such an injury meets the standards for irreparable harm." *Id.*

III. An Injunction Pending Appeal Will Not Harm Defendants and Is in the Public Interest.

Plaintiffs request an injunction pending appeal for the same reason they sought temporary relief from the district court: to preserve the status quo while the Court adjudicates the parties' constitutional claims. Plaintiffs have no desire for delay and are prepared to present the merits of their claims for resolution as expeditiously as the Court may permit. *See, e.g.*, *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, No. 12-2171 (1st Cir. order filed Oct. 3, 2012) (treating party's emergency motion for injunction as its opening brief and setting expedited briefing schedule).

If this Court ultimately upholds the RCV Act, the Governor will certify a winner using the RCV tabulation, and Defendants will experience no injury other than a temporary delay in certification. This is common when election results remain contested. *See, e.g.*, Mike Lillis, *Hoyer: Dems won't seat Harris until North Carolina fraud allegations are resolved*, THE HILL, Dec 4, 2018. "[A]ny harm… from a slight delay in certifying the election results is minimal in comparison to the irreparable injury that occurs when an individual suffers the loss of his constitutional rights." *Awad v. Ziriax*, 2010 WL 4676996, at *5 (W.D. Okla. 2010).

If this Court instead finds the RCV Act unconstitutional, it can tailor a suitable remedy, whether that be a declaration of legal rights and remittal to the

state for appropriate conformity, *see Love v. Foster*, 90 F.3d 1026, 1031 (5th Cir. 1996), *aff'd*, 522 U.S. 67 (1997); a permanent injunction, *see Bush*, 531 U.S. at 103; or ordering a new election, *see Griffin v. Burns*, 570 F.2d 1065, 1080 (1st Cir. 1978). Far from causing any harm, the Court's determination will instead serve the public interest by affording all Maine citizens the confidence of a constitutional election certification. *See Freeman v. Morris*, 2011 WL 6139216, at *4 (D. Me. 2011); *Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir. 2010) ("it is always in the public interest to prevent violation of a party's constitutional rights."). By allowing an opportunity to determine the merits of the parties' constitutional arguments, the requested injunction also will allow all Maine citizens to attain much-needed clarity over the state's use of RCV in their elections for federal office.

CONCLUSION

For the above-stated reasons, Plaintiffs respectfully request this Court to enjoin the State from certifying an election winner pending appeal and to expedite appellate review of the merits.

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Respectfully submitted,

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I hereby certify, on this 18th day of December, 2018, that:

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/s/ Joshua A. Randlett

CERTIFICATE OF SERVICE

I certify that on December 18, 2018, I electronically filed the foregoing Plaintiffs-Appellants' Emergency Motion for Injunction Pending Appeal with the U.S. Court of Appeals for the First Circuit using the CM/ECF system, and effected service by e-mail to the following:

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